

NATIONAL LABOR RELATIONS BOARD 1099 14th STREET NW WASHINGTON DC 20570

October 12, 2010

Re: <u>Hanson Aggregates BMC, Inc.</u> Cases 4-CA-33330 et al.

Louis Agre, Esq. 1375 Virginia Dr., Suite 100 Ft. Washington, PA 19034 Jonathan R. Nadler, Esq. Reed Smith LLP 2500 One Liberty Place Philadelphia, PA 19103

Elana R. Hollo, Esq. Counsel for the Actg. GC NLRB, Region 4 615 Chestnut St,. 7th FI. Philadelphia, PA 19106

Dear Counsels:

This is in response to IUOE Local 542's July 19, 2010 Motion for Modification of Board Order, Respondent's August 10 Response and Counsel for the Acting General Counsel's September 17 Response.

The Board's Decision and Order in this matter issued on September 30, 2008 (353 NLRB No. 28) (Chairman Schaumber and Member Liebman). Thereafter on December 22, 2008, the same two-member panel denied the General Counsel's Motion for Modification in which the General Counsel sought a broad general bargaining order rather than the limited one provided in the September 30, 2008 decision. On November 17, 2009, the United States Court of Appeals for the Third Circuit issued its certified judgment regarding the Board's September 30, 2008 Decision and Order and December 22, 2008 Order Denying Motion. Counsel for the International Union of Operating Engineers in its July 19, 2010 Motion seeks, in part, the same modification rejected on December 22, 2008. It notes that the Supreme Court, in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), invalidated all cases decided by the two member Board and suggests that the instant matter should be redecided by a quorum of members.

Although the Board's September 30 and December 22 decisions were decided by only two Board Members, the court's order and certified judgment upholding that decision became final prior to the Supreme Court's decision in *New Process Steel*. In these circumstances, the Board regards the matters finally resolved by the court of appeals as res judicata in this proceeding. See *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374-378 (1940); *Nemaizer v. Baker*, 793 F.2d 58, 65

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(2nd Cir. 1986) (cited with approval in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct 1367, 1377 [2010]), *Mays Printing Company, Inc.*, 355 NLRB No. 179, fn. 1 (September 15, 2010, and *The Lorge School*, 355 NLRB No. 94, fn. 1 (August 19, 2010).

Based on the foregoing, transmittal to the Board of IUOE Local 542's Motion for Modification would be improper. Accordingly, it must be rejected.

Very truly yours,

Richard D. Hardick

Associate Executive Secretary

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cc: parties